(1) (3)

IN THE HIGH COURT OF JUDICATURE OF CHHATTISGARH AT BILASPUR

Cr. Appel No. 142 /2004

APPELLANTS (IN JAIL)

1. Dinesh son of Kanhaiyalal Satnami aged 20 years.
2. Kanhaiya son of Sonpayare aged 39 years

Both are residentof village Dighora Police Station Pathariya District Bilaspur.

628/04

Filed on 10/02/04

by Shri A.R. Gupta Advocate

I.A. No. 2 (J) 04

2/2/04

VERSUS

RESPONDENT — State of Chhattisgarh through S.O. Pathe riya.

CONVICTION	SENTECES
U/S 302/34 IPC	Each for life Imprisionment and fine of Rs 1000/ In default of payment six months further rigorous impmisionment.

SESSION TRIAL NO. 44/2001.

CRIMINAL APPEAL UNDER SECTION 374(2) CRIMINAL PROCEDURE CODE 1973

XI-HC-22

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

आदेश पत्रक

मामला क्रमांक CRA NO. 142/04 सन् 200

विरुद्ध

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

DIVISION BENCH: -

HON'BLE MR. L.C. BHADOO AND
HON'BLE MR. V.K. SHRIVASTAVA, JJ.

12-12-2005

Shri J.S. Baraik, counsel for the appellants.

Shri G.K. Beriwal, Additional Public Prosecutor with Shri Akhil Mishra, Panel Lawyer for the State/respondent.

Oral judgment.

Learned counsel for the accused/appellants submitted that this is the second bail application and the accused/appellants are in custody for the last 5 years, therefore, the appeal itself may be heard finally to which Shri G.K. Beriwal, Additional Public Prosecutor for the State has no objection.

Therefore, arguments for final disposal were heard.

By this appeal, the accused/appellants have questioned the legality of the judgment of conviction and sentence dated 31-1-2004 passed by the 3rd Additional Sessions Judge, (F.T.C.) Mungeli in S.T. No.44/2001 whereby the learned Additional Sessions Judge after holding the accused/appellants guilty for the commission of murder of Hincharam sentenced each of them to undergo imprisonment for life and to pay a fine of Rs.1,000/-, in default of payment of fine to further undergo R.I. for 6 months.

The case of the prosecution, in brief, is that Hincharam lodged the F.I.R. (Ex.-P/25) at the Police Station Pathariya at about 8.30 am to the effect that on 1-11-2000 at about 7 am he was going to his agricultural field taking with him his plough and male buffalo. At that time, the male buffalo of

[पीछे देखिये

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(64)

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित -2	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Kanhaiya Satnami (accused/appellant) was also coming from the front side. On seeing the male buffalo of Kanhaiya, the male buffalo of Hincharam ran towards the male buffalo of Kanhaiya and started fighting. On this, accused Kanhaiya started abusing Hincharam and said that 'you are not able to separate your male buffalo' and after giving threat to him, he started assaulting him with a Lathi on the left hand, head and left parietal region. On seeing this, wife of Hincharam namely Janki Bai and son Shail Kumar @ Shailu tried to intervene. On this, accused Kanhaiya and Dinesh after giving threat to kill them, started assaulting them with a Lathi. On receiving this report from injured Hincharam, the S.H.O., Police Station Pathariya registered the crime at Sr. No.274/2000 (Ex.-P/25). The S.H.O. sent Hincharam and Shail Kumar for medical examination under Ex.-P/5 & 11 to the Primary Health Centre, Pathariya, where Dr. D.R. Singraul (PW-3) examined the injuries on the body of Hincharam and prepared the report Ex.-P/6. Looking to the condition of injured Hincharam, he was referred to the District Hospital, Bilaspur. The doctor also examined injuries of Shail Kumar and prepared the report Ex.-P/12. The injuries on the body of Shail Kumar were found simple in nature. On 15-1-2000, the Police sent Lathi for examination by the doctor under Ex.-P/13 and after examination of the same, the doctor gave the report Ex.-P/14 in which the doctor opined that injuries which were found on the body of Hincharam could be caused by Lathi in question. During the treatment in the Dharma District Hospital, Bilaspur, Hincharam succumbed to the injuries. Upon receiving the report on 11-11-2000 Crime No.74/2000 under Ex.-P/26 was registered. On receiving the report about the death of

[पीछे देखिये

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(64)

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित —3—	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Hincharam from the District Hospital on 5-11-2000 the merg intimation was registered. The Panchanama of the dead body Ex.-P/2 was prepared. The dead body was sent for postmortem examination. Dr. P.K. Tiwari (PW-6) conducted the postmortem on the body of the deceased on 5-11-2000 and prepared the postmortem report Ex.-P/19.

After completion of the investigation, charge sheet was filed in the Court of Judicial Magistrate, 1st Class, Mungeli who in turn committed the case to the Sessions Court, Bilaspur from where 3rd Additional Sessions Judge (F.T.C.) Mungeli received the case on transfer for trial. After hearing the arguments of Additional Public Prosecutor and counsel for the accused persons, learned Additional Sessions Judge convicted and sentenced the accused/appellants as mentioned in para-1 of this judgment.

In order to prove the offence against the accused/appellants the prosecution examined 12 witnesses. On the other hand, statements of the accused persons were recorded under Section 313 of the Cr.P.C. in which they denied the prosecution evidence and stated that they do not know why the witnesses are deposing against them.

We have heard Shri J.S. Baraik, counsel for the appellants and Shri G.K. Beriwal, Additional Public Prosecutor with Shri Akhil Mishra, Panel Lawyer for the State/respondent.

The fact of homicidal nature of death of Hincharam has not been disputed by learned counsel for the accused/appellants. Apart from that, from the evidence of PW-1 Shail Kumar, PW-2 Janki Bai, PW-3 Dr. D.R. Singraul who examined the injuries of Hincharam and the evidence of PW-6 Dr. P.K.

[पीछे देखिये

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(66)

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित -4-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Tiwari who conducted the postmortem, it is established that the death of Hincharam was homicidal in nature.

Now, coming to the involvement of the accused/appellants in crime in question, learned counsel for the accused/appellants vehemently argued that on the fateful morning accused/appellant Kanhaiya was going to his agricultural field with his plough and male buffalo. When he reached in front of the house of Hincharam, all of a sudden, Hincharam also came from his house with his male buffalo, the male buffalo of Hincharam attacked the male buffalo of Kanhaiya and in that process, the male buffalo of Kanhaiya received injuries. Hincharam also received the injuries in the fight of male buffaloes. The accused/appellants have been falsely implicated in the crime. He further argued that as far as accused Dinesh is concerned, in the F.I.R. it has not been mentioned that Dinesh also assaulted Hincharam. In the statement recorded under Section 161 of the Cr.P.C. PW-1 Shail Kumar has not stated that Dinesh assaulted his father with a Lathi. Even PW-2 Janki Bai has also not stated that Dinesh assaulted Hincharam, therefore, no offence against accused Dinesh was made out. He further argued that even if the case is taken on the face of it as it is, even then the offence against accused Kanhaiya does not travel beyond Section 304-II of the I.P.C., as the quarrel took place all of a sudden, without any preplan, when the male buffalo of Hincharam attacked the male buffalo of accused, in that process, in a heat of passion, the accused/appellants assaulted Hincharam.

On the other hand, Shri Akhil Mishra supported the judgment of the trial Court.

[पीछे देखिये

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(67)

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Having heard learned counsel for the parties, we have perused the evidence of so called eyewitnesses PW-1 Shail Kumar and PW-2 Janki Bai and also the judgment of the trial Court and other relevant records.

As far as involvement of accused Kanhaiya is concerned, Hincharam himself lodged the report (Ex.-P/25) before the Police Station in which he has categorically stated that Kanhaiya assaulted him with a Lathi. The statement made by Hincharam falls under the category of dying declaration made before his death in connection with the incident relating to his death. The said dying declaration stands corroborated by the evidence of PW-1 Shail Kumar who witnessed the crime and his evidence stands testified with the fact that he also received injuries in the incident. PW-2 Janki Bai was also in the house because that was the morning time, therefore, presence of Janki Bai in her house cannot be doubted, who also categorically stated that she saw Kanhaiya and Dinesh running with lathis. PW-7 Manglu has also stated that Hincharam while going in front of his house had said that he has been attacked by Kanhaiya. Therefore, in view of the above ample evidence i.e. dying declaration and the evidence of eyewitnesses, it is established that accused Kanhaiya assaulted the deceased with a Lathi. The evidence of dying declaration and eyewitnesses further stand corroborated by the medical evidence in which PW-3 Dr. D.R. Singraul has stated that on 1-11-2000 he examined the injuries on the body of Hincharam. There was one lacerated wound on head deep up to the bone and blood was oozing out of it. There was another lacerated wound on the right side of frontal region and blood was oozing out of it. There was a contusion on the left hand, right side of the chest

[पीछे देखिये

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(64)

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित — 6 —	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

on right knee and there were defused swelling on the left forehand. Therefore, finding of the trial Court regarding involvement of accused/appellant Kanhaiya in assaulting Hincharam does not require any interference by this Court.

Now, coming to the involvement of accused Dinesh, after perusal of the evidence of eyewitnesses and dying declaration made by Hincharam, we are of the considered opinion that finding of the trial Court convicting the said accused/appellant under Section 302 read with Section 34 of the I.P.C. cannot be sustained for the reasons that in the dying declaration (Ex.-P/25) of Hincharam, it has nowhere been mentioned that accused Dinesh also assaulted him. Moreover, the evidence of PW-7 Manglu also shows that the deceased while going said that Kanhaiya has assaulted him. Even PW-2 Janki Bai has not stated that she saw Dinesh assaulting her husband. PW-1 Shail Kumar has made improvement in his examination-in-chief and has stated that Kanhaiya and Dinesh were assaulting his father with Lathis whereas, in the Police diary statement this aspect of involvement of Dinesh in assaulting Hincharam does not find place, therefore, this is an after thought and improvement and it cannot be considered as a legal evidence. There is no evidence regarding involvement of accused Dinesh in assaulting Hincharam with lathi, as such the conviction and sentence awarded by the trial Court deserve to be set aside.

Now, coming to the question as to which offence is made out against accused Kanhaiya, the injury report Ex.-P/6 and the evidence of Dr. Singraul (PW-3) show that there were 2 lacerated wounds on the left side of the forehead and right side of the temporal region. There were other injuries on

[पीछे देखिये

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(67)

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित — 7 —	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

the hand and legs and the doctor has opined that the cause of death was shock due to head injury. There were only 2 lacerated wounds on the head .One injury was fracture of the forearm and other injuries were simple in nature. It is also admitted fact that the deceased died after 4 days of the incident i.e. on 5-11-2000. There is nothing on record which shows that the accused attacked Hincharam with the intention to cause his death. The facts of this case are also admitted to the effect that quarrel started all of a sudden when the male buffalo of both the deceased and the accused started fighting and in that process, in a heat of passion, the accused and the deceased also started quarrelling. Accused Kanhaiya, all of a sudden, assaulted with a Lathi on the head, hand and legs of the deceased. No boney injury/ was found and Hincharam died after 4 days of the incident. The totality of the facts and circumstances of the case shows that accused Kanhaiya assaulted the deceased in a heat of passion, all of a sudden, in the spur of moment, in a sudden quarrel, without any pre-plan and in this fight, accused Kanhaiya also received injuries even though those injuries were simple in nature.

Therefore, from the above facts, it cannot be inferred that accused Kanhaiya attacked the deceased with the intention to commit his murder. However, it can safely be inferred that while assaulting with Lathi on the head and other parts of the deceased, the accused had definite knowledge that by causing such injury Hincharam is likely to die, therefore, present case falls under Exception-IV of Section 300 of the I.P.C. and offence against accused/appellant Kanhaiya under Section 304-II of the I.P.C. is made out instead of Section 302 of the I.P.C..

[पीछे देखिये

XI-HC-22

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(70)

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित — 8 —	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश
	In the result, the appeal is partly allowed. The accused/appellants namely, Dinesh and Kanhaiya are acquitted of the charge under Section 302 read with Section 34 of the I.P.C. and their conviction under that section is set aside. Instead thereof, accused/appellant Kanhaiya is convicted under Section 304-II of the I.P.C. and sentenced to undergo rigorous imprisonment for 10 years. The period for which accused/appellant Kanhaiya remained in custody during investigation and trial of this appeal shall be set off against the above sentence. Accused/appellant Dinesh be set at liberty forthwith, if not required in any other case.	

Sd/-
L.C.BHADOO
Judge

Sd/-
V.K.Shrivastava
Judge

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20-12-05

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